



# General Assembly

Distr.: Limited  
2 August 2012

Original: English

---

**United Nations Commission  
on International Trade Law**  
Working Group II (Arbitration and Conciliation)  
Fifty-seventh session  
Vienna, 1-5 October 2012

## **Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration**

**Note by the Secretariat**

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction .....	1-5	2
II. Draft rules on transparency in treaty-based investor-State arbitration .....	6-28	3
A. Content of draft rules on transparency in treaty-based investor-State arbitration .....	6-28	3
Article 1. Scope of application .....	6-23	3
Article 2. Publication of information at the commencement of arbitral proceedings .....	24-28	8



## I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)<sup>1</sup> that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.<sup>2</sup>

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of such treaties already concluded.<sup>3</sup>

3. At its forty-fifth session (25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011,<sup>4</sup> and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.<sup>5</sup>

4. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.<sup>6</sup> At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed a first reading of the draft rules on transparency in treaty-based investor-State arbitration (as contained in document A/CN.9/WG.II/WP.166 and its addendum).<sup>7</sup> At its fifty-sixth session (New York, 6-10 February 2012), the Working Group commenced a second reading of the draft rules on transparency (as contained in document A/CN.9/WG.II/WP.169 and its addendum).<sup>8</sup>

5. In accordance with the decisions of the Working Group at its fifty-sixth session,<sup>9</sup> part II of this note contains a revised draft of articles 1 and 2 of the rules on transparency. Articles 3 to 8 of the draft rules on transparency are dealt with in document A/CN.9/WG.II/WP.169 and article 9 on the

---

<sup>1</sup> *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum* (A/63/17 and Corr.1), para. 314.

<sup>2</sup> *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

<sup>3</sup> *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

<sup>4</sup> *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum* (A/63/17 and Corr.1), para. 314; *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

<sup>5</sup> Report of the Commission on the work of its forty-fifth session (*under preparation*).

<sup>6</sup> Reports of the Working Group on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions.

<sup>7</sup> Report of the Working Group on the work of its fifty-fifth session (A/CN.9/736).

<sup>8</sup> Report of the Working Group on the work of its fifty-sixth session (A/CN.9/741).

<sup>9</sup> *Ibid.*

establishment of a repository of published information is dealt with in document A/CN.9/WG.II/WP.169/Add.1. Comments received from arbitral institutions on the interplay between the draft rules on transparency and their institutional rules can be found in document A/CN.9/WG.II/WP.173. A proposal by Governments on article 1 (1) of the draft rules on transparency is reproduced in document A/CN.9/WG.II/WP.174.

## **II. Draft rules on transparency in treaty-based investor-State arbitration**

### **A. Content of draft rules on transparency in treaty-based investor-State arbitration**

#### **Article 1. Scope of application**

##### **6. Draft article 1 — Scope of application**

###### Paragraph (1) — Applicability of the legal standard on transparency

*“1. These Rules shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors (“treaty”)\* when the Parties to the treaty [or all parties to the arbitration (the “disputing parties”)] have agreed to their application. In a treaty concluded after [date of coming into effect of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to incorporate the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules [that does not refer to the Rules on Transparency].”*

###### Paragraph (2) — Application of the rules on transparency by the disputing parties

*“2. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty,*

*(a) the [disputing parties] [the parties to that arbitration (the “disputing parties”)] may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;*

*(b) in the application of the Rules on Transparency, the arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision to the particular circumstances of the case if this is necessary to achieve the transparency objectives of these Rules in a practical manner.*

###### Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration rules

*“3. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is any conflict between the*

*Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail.*

Paragraph (4) — Relationship between the rules on transparency and the applicable law

*“4. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.*

Paragraph (5) — Discretion of the arbitral tribunal

*“5. Where these Rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.*

Footnote to article 1, paragraph 1:

*“\*For the purpose of these Rules, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any agreement concluded between or among States or regional integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, that contain provisions relating to the protection of investments or investors and their right to resort to investor-State arbitration.”*

## **Remarks**

*Paragraph (1) — Applicability of the legal standard on transparency*

7. At its fifty-sixth session, the Working Group entrusted the secretariat with the preparation of a revised version of article 1 (1) (A/CN.9/741, paras. 54 and 57). At that session, the Working Group had considered two options for the applicability of the rules on transparency. Under the first option, the opt-out solution, the rules on transparency would be incorporated in the UNCITRAL Arbitration Rules (as revised in 2010) (the “2010 UNCITRAL Arbitration Rules”) and would apply as an extension of the UNCITRAL Arbitration Rules under investment treaties providing for arbitration under the UNCITRAL Arbitration Rules, unless the investment treaty provided that the rules on transparency did not apply (A/CN.9/741, para. 14). Under that option, it was discussed whether the rules on transparency would also apply to arbitrations arising under existing treaties on the basis of a “dynamic reference”, referred to in the discussion by the Working Group as “dynamic interpretation”, meaning that any reference to the UNCITRAL Arbitration Rules from the date of adoption of the rules on transparency in an investment treaty, including existing investment treaties, would also incorporate the rules on transparency (A/CN.9/741, paras. 20 and 42). Under the second option, the opt-in solution, the rules on transparency would only apply when the High Contracting parties (referred to as “Parties”) to an investment treaty expressly consent to their application (A/CN.9/741, para. 14).

8. At that session, views expressed differed on (i) whether an opt-in or opt-out approach was preferable and (ii) whether the possibility of dynamic interpretation for existing treaties should be left open. Views were expressed in favour of both options with a majority view for the first option (A/CN.9/741, para. 55).

9. Pursuant with the instructions from the Working Group to redraft article 1 (1) based on the deliberations at its fifty-sixth session (A/CN.9/741, paras. 54 and 57), the first sentence of draft paragraph 1 states the general principle of public international law that Parties can only be bound by an external set of rules if they have so agreed. In order to clarify that no dynamic interpretation of investment treaties could make the rules on transparency applicable in the context of such existing treaties, an expression of agreement is required for the rules to apply. The second sentence of paragraph (1) refers to treaties concluded after the date of coming into effect of the rules on transparency. It establishes a presumption in favour of the applicability of the rules on transparency. Delegations that found it difficult to agree with that approach (A/CN.9/741, para. 59) were invited to coordinate their efforts and to communicate drafting suggestions in that respect to the secretariat for consideration by the Working Group (see A/CN.9/WG.II/WP.174).

10. The Working Group may wish to consider whether to include a reference to “all disputing parties” in article 1 (1), in order to clarify that the disputing parties are permitted to apply the rules on transparency.

*Effect of the rules on transparency as stand-alone rules and as appendix on the 2010 UNCITRAL Arbitration Rules and on existing treaties*

11. At its fifty-sixth session, the Working Group requested the secretariat to provide an analysis of the implications of presenting the transparency rules in the form of an appendix to the UNCITRAL Arbitration Rules or as a stand-alone text. If the rules on transparency were to become an appendix to the UNCITRAL Arbitration Rules, there would be three sets of UNCITRAL Arbitration Rules: 1976 UNCITRAL Arbitration Rules, 2010 UNCITRAL Arbitration Rules and the 2013 or 2014 UNCITRAL Arbitration Rules (the “new UNCITRAL Arbitration Rules”).

*a. UNCITRAL Arbitration Rules*

12. If the rules on transparency became an appendix to the 2010 UNCITRAL Arbitration Rules, it would constitute a modification to the Rules and result in a new set of UNCITRAL Arbitration Rules (see above, paragraph 11). For example, article 1 (2) of the 2010 UNCITRAL Arbitration Rules would need to be modified in order to clarify the relationship between the rules on transparency and the UNCITRAL Arbitration Rules. Other provisions of the 2010 UNCITRAL Arbitration Rules that would be affected, i.e. modified or supplemented by the application of the rules on transparency, would be articles 3, 4, 17 (1), 28 (3), 34 (5) (see also A/CN.9/WG.II/WP.169, paras. 25-34).

13. The Working Group may further wish to consider whether including the rules on transparency in an appendix to the 2010 UNCITRAL Arbitration Rules would modify their generic applicability, as the modification of the 2010 UNCITRAL Arbitration Rules would, in fact, constitute a specific set of arbitration rules for

treaty-based investor-State arbitration. If the 2010 UNCITRAL Arbitration Rules would be so modified, the question would arise whether other investment specific provisions should be added to this new set of rules. Confusion might arise between the 1976 and 2010 UNCITRAL Arbitration Rules as generic arbitration rules and the new UNCITRAL Arbitration Rules.

14. Another factor the Working Group may wish to consider in forming its decision on the form of the rules on transparency is the risk that arbitral institutions might not be encouraged to promote the application of the rules on transparency, if such rules were included in an appendix to the 2010 UNCITRAL Arbitration Rules. In such case, the arbitral institutions would have to apply as a prerequisite a set of arbitration rules different from their own rules for the application of the rules on transparency. This might run counter to the objective of achieving the widest possible application of the rules.

15. If the rules on transparency were stand-alone rules, they could be applied to any other arbitration rules thus providing a wider application of the rules on transparency. The application of the rules on transparency to other arbitration rules would be possible, as parties are free to agree to modify the applicable arbitration rules (see also document A/CN.9/WG.II/WP.173). Arbitral institutions have applied a higher standard of transparency in arbitral proceedings if so wished by the parties (see document A/CN.9/736, para. 28). The Working Group may wish to take note that, at its fifty-sixth session, arbitral institutions referred to in document A/CN.9/WG.II/WP.170 and Add.1 had commented that the rules on transparency in the form of a stand-alone text could operate in conjunction with their own institutional rules (A/CN.9/741, para. 29; see also document A/CN.9/WG.II/WP.173).

16. The presumption on the application of the rules on transparency contained in article 1 (1) of the draft rules on transparency would apply to the same extent if the rules on transparency were to take the form of stand-alone rules or an appendix.

*b. Existing treaties*

17. At the fifty-sixth session of the Working Group, concerns had been expressed that it might be difficult to exclude a dynamic interpretation as was sought to be done if the transparency rules were presented as an appendix to the UNCITRAL Arbitration Rules (A/CN.9/741, para. 57). In the deliberations of the Working Group, a “dynamic interpretation” was referred to when an investment treaty permitted application of the most up-to-date version of the UNCITRAL Arbitration Rules (A/CN.9/741, para. 42). If the rules became an appendix to the 2010 UNCITRAL Rules and, as a consequence, such rules were updated as a set of rules specific to investment arbitration (see above, paragraph 13), it might be particularly difficult to avoid their application to existing treaties through a dynamic interpretation relying on the most up-to-date version of the UNCITRAL Arbitration Rules. If the rules on transparency were to take the form of stand-alone rules, the possibility of a dynamic interpretation would be more limited.

18. Regarding the various instruments to make the rules on transparency applicable to existing treaties to be further considered by the Working Group (A/CN.9/736, paras. 134-135, and A/CN.9/WG.II/WP.166/Add.1, paragraphs 10-23), the form of the rules on transparency, either stand-alone or an appendix, would

result in no difference. Those instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the “Vienna Convention”) with regard to existing investment treaties or (iv) amendment or modification pursuant to articles 39-41 Vienna Convention of existing investment treaties.

*Paragraph (2) — Application of the rules on transparency by the disputing parties*

19. Article 1 (2) as contained in paragraph 6 reflects the modifications found acceptable at the fifty-sixth session of the Working Group (A/CN.9/741, paras. 74, 78 and 81). Article 1 (2) reflects the principle that the disputing parties could not derogate from the rules on transparency unless permitted do so by the treaty. The policy reason is that it would not be appropriate for the disputing parties to reverse a decision made by the State Parties to the investment treaty on that matter and that the rules on transparency were meant to benefit not only the investor and the host State but also the general public (A/CN.9/741, para. 61). Pursuant to the decision made by the Working Group at its fifty-sixth session, article 1 (2) provides, in addition, for the possibility that the arbitral tribunal could adapt the rules on transparency to ensure efficiency of arbitral proceedings without allowing derogation from them (A/CN.9/741, para. 73, 74, 78 and 81). The Working Group may further wish to consider which circumstances might give rise to such adaptation (A/CN.9/741, para. 73). As a matter of drafting, the Working Group may wish to note that if the reference to the disputing parties is retained under paragraph 1, the definition of disputing parties in article 1 (2)(a) would be deleted.

*Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration rules*

20. At the fifty-sixth session of the Working Group, a large majority was in favour of including a provision on the relationship between the rules on transparency and the applicable arbitration rules in the rules on transparency. The Working Group may wish to note that reference in the current provision on the relationship between the rules on transparency and the applicable arbitration rules contained in article 1 (3) is only made to the applicable “arbitration rules”, as it captures the applicable version of the UNCITRAL Arbitration Rules and any other arbitration rules.

*Paragraph (4) — Relationship between the rules on transparency and the applicable law*

21. At its fifty-sixth session, the Working Group mandated the secretariat to complement the provision on the relationship between the rules on transparency and the applicable arbitration rules with a provision on the relationship between the rules on transparency and the applicable law pursuant to the provision contained in article 1 (3) of the 2010 UNCITRAL Arbitration Rules (A/CN.9/741, para. 97). The Working Group may wish to consider article 1 (4) as contained in paragraph 6 above, which closely follows the wording of article 1 (3) of the 2010 UNCITRAL Arbitration Rules. The Working Group may wish to note that there is the possibility

that, depending on the applicable domestic law in relation to treaty law and transparency, parties could derogate from the rules on transparency.

*Paragraph (5) — Discretion of the arbitral tribunal*

22. At its fifty-sixth session, the Working Group adopted the substance of the paragraph on discretion of the arbitral tribunal (A/CN.9/741, para. 85), which provides for the exercise of discretion by the arbitral tribunal where so permitted under the rules on transparency, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State arbitration and of the particular arbitral proceedings and (b) the disputing parties' interest in a fair and efficient resolution of their dispute.

*Footnote to article 1 (1)*

23. The Working Group may wish to consider the footnote to article 1(1) providing for a definition of the term "a treaty providing for the protection of investments or investors" under the rules on transparency, which reflects the drafting proposals made at the fifty-sixth session of the Working Group. The footnote aims at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in a broad sense (A/CN.9/741, paras. 101-102). At that session, the Working Group adopted the footnote subject to the deletion of the word "intergovernmental" after the word "integration" and the use of reference to the "protection of investments and investors" in a consistent manner.

**Article 2. Publication of information at the commencement of arbitral proceedings**

24. Draft article 2 — Publication of information at the commencement of arbitral proceedings.

*"Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 9. Upon its receipt of the notice of arbitration from either party, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made."*

**Remarks**

25. At its fifty-sixth session, the Working Group adopted draft article 2 in the version that left the publication of the notice of arbitration (and of the response thereto) to be dealt with under article 3, after the constitution of the arbitral tribunal with some drafting modifications (A/CN.9/741, para. 109).

26. Draft article 2 encapsulates the drafting modifications agreed to by the Working Group (A/CN.9/741, para. 109) in order to clarify that all disputing parties should have the obligation to send the notice of arbitration to the repository. The repository in turn should publish the information once it receives the notice of arbitration from either party.

27. The Working Group may wish to consider how to deal with the situation where a notice of arbitration would be sent by a claimant to the repository before the arbitral proceedings had commenced, i.e., before the notice of arbitration had been received by the respondent (A/CN.9/741, para. 107). The Working Group may further wish to consider whether the opening words “once the notice of arbitration has been received by the respondent” sufficiently address that matter. The Working Group may also wish to consider the difficulties of fulfilling the administrative functions involved for the repository in that regard.

28. At the fifty-sixth session of the Working Group, it was suggested to harmonize the language used in the rules with regard to publication of information or documents as, for instance, the words “published” or “made available to the public” were used. The Working Group further requested the secretariat to examine whether a different meaning was intended in the use of the various terms referring to publication and to further examine how a consistent approach could be achieved. The Working Group may wish to note that the word “publish” occurs in the current draft of the Rules on Transparency only in the title of draft article 9 “Repository of published information” (draft articles 1-2 as contained in document A/CN.9/WG.II/WP.172 and draft articles 3-9 as contained in document A/CN.9/WG.II/WP.169 and Add.1). The draft rules use the noun “publication” and the verb “make available to the public” with no different meaning intended.

---